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Supreme Court of the United States

OCTOBER TERM 1949

No. 76 **76**

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF STATE OF NEW YORK

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SUBJECT INDEX.

PAGE

Application for Leave to File Brief as Amicus Curiae . . 1

Brief for the State of New York as Amicus Curiae 1

Statement 1

The Interest of the State of New York 3

Argument 5

The States are not powerless under the Fourteenth Amendment of the United States Constitution to obtain personal jurisdiction in cases arising out of business transactions originating beyond their borders which come into direct and substantial control with the interests of their residents within them 5

Table of Cases Cited.

Allgeyer v. Louisiana, 165 U. S. 580 7

Eastman Company v. Southern Photo Co., 273 U. S. 359 9

German Alliance Insurance Company v. Kansas, 233 U. S. 389 3

Hoopeston Canning Co. v. Cullen, 318 U. S. 313 7

International Harvester Co. v. Kentucky, 234 U. S. 579, 583 (1914) 5

International Shoe Co. v. Washington, 326 U. S. 310 . . . 8, 9, 10

Lincoln Union v. Northwestern Co., 335 U. S. 525, 535 . . . 7

Osborn v. Ozlin, 310 U. S. 53 . . . . . 6, 7

St. Louis, Southwestern Ry. Co. v. Allexander, 227 U. S. 218 (1913) 5

United States v. Scophony Corp., 333 U. S. 795 9

Statutes Cited.

New York Insurance Law

Section 59-a (Chap. 826, L. 1949, subd. 1) 3

Section 59-a, subd. 2, pars. (a) and (b) 5

New York Leg. Doc. [1949] No. 70 4

Virginia Securities Law, Section 6 2

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Now comes the State of New York, by its Attorney General, and respectfully begs leave of the Court to submit the subjoined brief as *amicus curiae* upon the above-entitled appeal in which probable jurisdiction has been noted and the case transferred to the summary docket.

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Statement

The case involves the efficacy, on jurisdictional grounds, of a cease and desist order issued by the Virginia State

Corporation Commission against an unauthorized foreign insurer and its treasurer after notice sent by registered mail to them in Nebraska under Section 6 of the Virginia Securities Law. That statute authorizes such service when personal service within the State cannot be had because the offering of securities (which the appellants' membership certificates and contracts of indemnity or insurance are conceded to be within the statute) is by "advertisement and or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State." The appellant insurer had not qualified its "securities" in accordance with Virginia law nor was it authorized to transact the business of insurance therein.

The appellant Association was incorporated under the laws of Nebraska and primarily confines its activities in soliciting, effectuating and carrying out its contracts of indemnity or insurance with residents of other States by transactions through the mail. The agreed facts are that the Association never had any office or agent in Virginia although it was also agreed that new members are usually obtained through recommendations of existing members, presumably including those in Virginia, and that claims have been investigated during the period that the Association has solicited and obtained numerous memberships throughout Virginia, payment being made by mail from the home office.

The appellants contend among other things that the service of process as authorized and made is invalid under due process requirements to enable Virginia to subject them to any *in personam* order or requirement. It is this phase of the case which is of particular importance to the State of New York because of provisions in its own statutes sub-

jecting unauthorized foreign and alien insurers to the jurisdiction of the New York courts in suits by or on behalf of resident insureds or beneficiaries under contract with such insurers.

The Interest of the State of New York

By Chapter 826 of the Laws of 1949 there was added to the New York Insurance Law (McKinney's Consolidated Laws of New York, Book 27) a new Section 59-a. This seeks to utilize the public authority of the State for the protection of its own residents with whom unauthorized foreign insurers have entered into binding contractual relations by business means under which the insurer is able to avoid physical entry into the State by its directly employed agents.

Subdivision 1 of the Act asserts the concern of the State that its residents insured by unauthorized insurers are faced with "the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." In furtherance of that interest the Legislature provided a method of substituted service on such insurers by exercising its power to define what "constitutes doing business" within the legitimate local concern of the State so as to bring the contracting party under the jurisdiction of the State courts for the enforcement of its obligations.

The long-settled power of the State to regulate the business of insurance as seriously affecting the public welfare (*German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389) clearly justifies its concern with the obvious problem of the unauthorized insurer which seeks to remain beyond its reach while at the same time inducing those who may look to it for protection to enter into insurance contracts.

The legislative finding, presumptively correct, of an existing situation calling for any valid and appropriate exercise of the public power needs no unwarranted assumptions. The evil is clear and present. Contractual obligations, even if otherwise unobjectionable, without practical means of enforcing them present an obvious field for overreaching the public by the unscrupulous or even by those who do not exercise a high degree of the restraint imposed only by the desire to meet the bargain fairly. The evils affecting the State's interest arising out of the activities of unlicensed insurers were stated by the Joint Legislative Committee on Insurance Rates and Regulation in its 1949 Report to the Legislature recommending enactment of Laws of 1949, Chapter 826 (Leg. Doc. [1949] No. 70, pp. 41 *et seq.*)

The method adopted was a definition of the acts deemed sufficient to bring an unauthorized foreign insurer into such direct contact within the State with its residents in the course of its business that it could be subjected to the personal jurisdiction of its courts. Any act of such an insurer in New York, "effected by mail or otherwise", consisting of the issuance or delivery of insurance contract to New York residents or authorized corporations, the solicitation of such contracts, the collection of the consideration therefor or "any other transaction of business" is made equivalent to and constitutes the appointment of the Superintendent of Insurance as agent for the service of process in any suit or proceeding by or on behalf of an insured or beneficiary arising out of any such contract of insurance. The Superintendent is then required to forward a copy of any process so served to the defendant at its last known principal place of business by registered mail. Such service is only sufficient provided the plaintiff also and within ten days sends notice of service on the Superin-

tendent and a copy of the process to the defendant by registered mail, return receipt requested (Insurance Law, § 59-a, subd. 2, pars. (a) and (b)).

The inspiration for such a statute is the same as that which prompted Virginia, under her Securities Law, to assert jurisdiction to restrain transactions of unauthorized foreign insurers looking to insurance obligations by and to her citizens and effective within her borders. Its validity is similarly affected by consideration of whether the State has taken hold of a subject in sufficiently direct contact with its proper local concerns within its borders.

ARGUMENT

The States are not powerless under the Fourteenth Amendment of the United States Constitution to obtain personal jurisdiction in cases arising out of business transactions originating beyond their borders which come into direct and substantial control with the interests of their residents within them.

There can be derived from the cases no rigid formula for determining when business reaching across State lines is being carried on or done in a State within the meaning of that State's statutes and reach of its jurisdiction. This Court has refused to plot precise lines leading to mathematical results (see *St. Louis, Southwestern Ry. Co. v. Alexander*, 227 U. S. 218 (1913); *International Harvester Co. v. Kentucky*, 234 U. S. 579, 583 (1914)). The appellants in the instant case, however, put forth a dogmatic means of determination claimed to be decisive. In order to support service of process other than personally so as to give *in personam* jurisdiction, it is asserted as an absolute requisite that there must have been conduct of the defendant's af

fairs within the State of the forum by the defendant or his or its agent physically present.

In arguing thus appellants wave aside all realistic appraisal of the effective reach of their activities as a whole into other States and put a premium upon artful avoidance of such States' power asserted on behalf of those of their citizens with whom business is done. To maintain that business is done only in the chosen State of incorporation or of domicile by an unauthorized mail order insurer ignores the results of the whole course of the business. Care to remain physically within distant boundaries no more confines business activities therein than does the fact that the insured never leaves his home State prevents the making of the contract. Where, by the use of instrumentalities such as the mails, an insurer is enabled to project the contracts which constitute the means of doing its business into other States, a fair appraisal of the facts compels the conclusion that it has transacted business therein. The fact that effective and binding contracts come into existence by this means even though the insured never physically leaves the State of his residence is ample evidence of real and substantial contact between insured and insurer therein. The independent agency of the post office as effectively accomplishes the out-of-state insurer's contact as does the retained agent who carries the solicitation or the policy to the insured. Indeed, it is the State of the insured's residence which has the most direct interest in the faithful performance of the contract and is most seriously affected by the contact thus effectuated.

Osborn v. Ozlin, 310 U. S. 53, indicates that the legitimate interest of a State in the subject matter of insurance transactions supports the exercise of its power even with respect to contracts made beyond its borders. Subsequent

ly, in *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, this Court measured the interest of New York in regulating reciprocal insurance "by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss". Earlier "conceptualistic" theories of the place of contracting or of performance were discarded as proper measures of the substantial interest of the State and the more recent recognition was affirmed that business may be being done in a State despite scrupulous care that the signing of contracts take place elsewhere.

The validity of statutes personally reaching out-of-state insurers with respect to local risks need involve no conflict with the doctrine of *Allgeyer v. Louisiana*, 165 U. S. 580. Some of the broader implications sought to be derived from that case have been restricted by this Court's view of its limitations (*Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; and see *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 535.) At best that case denies State power only where the insured deliberately goes beyond the borders of the State to seek coverage. We deal here with no such factor relating to an individual transaction. We are concerned with measures designed to effectuate the substantial local interest in the protection of local residents who have been sought out and reached in their home States and who have not intended or attempted to remove their insurance transactions from the local jurisdiction. In New York this is accomplished by making the local courts available to residents who have responded to solicitation, set in motion by out-of-state insurers not subject to the restrictions of New York license, which have reached them in New York, by applications sent from New York resulting in insurance contracts received by them in New York. Such transactions result in obligations effective in New York and which could be enforced there as to

obligations assumed by the insured. It is only provided that an insurer thus conducting its affairs so as to bring them into such intimate relation with the protective concern of the State by transactions extending into New York may be compelled to observe its obligations. This is done by a reasonable definition of those activities which when effected in New York by any instrumentality on behalf of a foreign insurer subject it to personal jurisdiction under provisions giving it adequate and actual notice.

In *International Shoe Co.* v. *Washington*, 326 U. S. 310, the touchstone of "presence" was denied as an absolute for sustaining jurisdiction *in personam* upon adequate notice. The court rejected the historical concept giving *in personam* jurisdiction only where the defendant's person is within the power of the court. It sustained such jurisdiction where the defendant's "minimum contacts" with a State were sufficient so that he could reasonably be required to defend a suit there arising out of such contacts, even though not then physically present in the forum. In this case there were salesmen of the defendant in the State and the old rule that "mere solicitation" did not authorize jurisdiction was rejected. It does not appear that the "minimum contacts" required by this decision could be satisfied only by the presence of such directly employed agents. "Mechanical" or "quantitative" criteria were not designed to be set. Under the New York statute the activities of the corporation which it projects into the State would "give rise to the liabilities sued on" and the defendant would have employed an instrumentality to carry its invitation physically into the State and set in motion there activities integrating into binding insurance contracts with local residents sent to them there. Those obligations arise "out of" and are "connected" with activities within the State procured by the defendant beyond its borders. "A procedure which requires the corporation to respond to a

suit brought to enforce them" upon adequate notice can no more than in the *International Shoe* case "be said to be undue".

In *United States v. Scophony Corp.*, 333 U. S. 795, the Court dealt with the provisions of the Clayton Act governing venue and service of process in anti-trust suits in the Federal courts. This permits the venue to be laid where the corporation is an "inhabitant" or in any district where it may be "found or transacts business". Service may be made "in the district of which it is an inhabitant or wherever it may be found". Both problems were presented. In considering the propriety of the venue the Court approved the approach previously taken in *Eastman Company v. Southern Photo Co.*, 273 U. S. 359, and refused to be limited by technical glosses of meaning which had earlier filled the concept of "carrying on business" with particularized refinements. It approved "the practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' " as the test of venue.

The case presented no constitutional issue as to the utmost reach of congressional power. The Court, therefore, found no necessity of extending to the *Scophony* case the criteria formulated in the *International Shoe* case where the question was one of the jurisdiction of a State over a foreign corporation for purposes of suit and service of process (Note 13, p. 804). There is here a clear suggestion that where the problem is one of power the "minimum contacts" required to sustain it are even less than that transaction of business required by the Federal statute.

The Court went on to hold that *Scophony Corp.* was "found" in the district where service was made under any realistic view of the actual facts presented. The continuing and far reaching nature of the enterprise was held to make unnecessary consideration of precedents dealing with "the

very different businesses and activities of manufacturing and selling". The Court was mindful that otherwise, though venue could be supported, it would be impossible to make valid service on a corporation which was an "inhabitant" of a foreign country. This is a corollary to the remedial purpose it recognized in the Clayton Act to make venue possible without resort to forums distant from where the wrong was perpetrated, often an "insuperable obstacle". The Court felt that its ruling offered no conceivable offense to the ideas of "fair play and substantial justice" which had guided its decision as to State power in the *International Shoe* case.

State statutes permitting process to run to unauthorized foreign insurers with respect to matters arising out of activities coming into substantial contact with the interests of the State and of its citizens within its borders are similarly designed to remove obstacles otherwise preventing any practical method of enforcing local obligations. The continuing nature of the obligations sought to be assumed by such insurers, the paramount interest of the State of the insureds' residence in their faithful performance, the reality of the contact which is effected locally in the course of the business transactions involved, furnish a just and reasonable basis for making a foreign insurer amenable to local jurisdiction. The requirements of due process do not seem designed to create obstacles to local suit where the corporation has utilized methods bringing it into effective business contact with the State of the forum. Nor do they seem designed to prevent a State from exerting its protective power to assure that its citizens will not be exposed to fraud and misrepresentation in the place of their residence because notice of its action must be sent beyond the State by mail. Notice by mail is quite as adequate as the same medium is effective in bringing the corporation's activities within the State.

It is respectfully submitted that the provisions of the Virginia Securities Law involved herein should be held valid and constitutional.

Dated, November 7, 1949.

Respectfully submitted,

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Other States Joining Herein

The undersigned States, by their respective Attorneys General, do hereby join in the foregoing brief of the State of New York as *amicus curiae* and urge upon this Honorable Court the contentions therein advanced.

STATE OF NEW HAMPSHIRE,
By: WILLIAM L. PHINNEY,
Attorney General.

STATE OF MARYLAND,
By: HALL HAMMOND,
Attorney General.